IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

APPEAL FROM ORDER No 425 of 2004
with
CIVIL APPLICATION No 10186 of2004

For Approval and Signature:

HON'BLE MR.JUSTICE K.S.JHAVERI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

JASUBHAI KANTIBHAI PATEL

Versus

SULOCHANABEN GORDHANBHAI

Appearance:
1. Appeal from Order No. 425 of 2004
MR MITESH R AMIN for Appellant No.
MR DV PARIKH for Respondent No. 1
..... for Respondent No. 2-30

CORAM : HON'BLE MR.JUSTICE K.S.JHAVERI

Date of decision: 05/05/2005

CAV JUDGEMENT

1. This appeal is directed against the order dated 14th December 2004 passed below Notice of Motion Exh.5/6

in Civil Suit No.2745/2001 by the Chamber Judge, Court No.14, Ahmedabad, whereby the said Notice of Motion was partly allowed and the defendants were directed to maintain status quo in regard to four shops and advertisement hoardings as indicated in Court Commissioner's Report dated 20.6.2001 till final disposal of the suit.

2. The appellant-plaintiff filed Civil Suit No.2745/2001 in the City Civil Court at Ahmedabad praying for a declaration that the respondents-defendants are not entitled to disturb and interfere with the plaintiff's possession and enjoyment of the suit property being Sub-plot No.2 and 3 of Survey No.202, Mouje Vadaj, Taluka City, District and Sub District Ahmedabad, admeasuring respectively 1 acre and 29.5 guntha and 1 acre and 13 gunthas. The appellant has also prayed for permanent injunction against the respondents restraining from from executing any document or agreement or transferring or assigning any charge over the property. The said suit has been filed on the premises that the appellant is in independent and peaceful possession and occupation of the suit property since last many decades and such possession has not been disturbed by any party.

3. The appellant also filed an application for injunction Exhs.5 and 6. Initially the trial court on 18.6.2001 passed the following order:

> "Relying upon the documents on record, the plaintiff claims to be in possession of the suit property and apprehends dispossession at the hands of the defendants. Therefore plaintiff's interest is required to be protected at this stage. Delay will defeat the purpose. Hence defendants are directed to maintain status quo with regard to possession of the suit property till 26.6.2001. Issue notice returnable on 26.06.2001. Defendants are at liberty to move this Court, if need, for urgent hearing. Plaintiff to comply with Order 39, Rule 3 of the CPC."

4. Thereafter the trial court finally heard the injunction application and disposed of the same by order dated 14th December 2004 as stated above. The present appeal is filed against the said order in so far as the injunction application is partly rejected.

5. At the outset it is required to be noted that the present appeal is directed against the interlocutory

order in so far as injunction is refused by the trial court. Therefore, this Court is required to see that whether the appellant has a prima facie case or not and whether the balance of convenience is in favour of the appellant and it is not required to go deep into the merits of the matter in which case any observations which may be made in this order would affect the parties at the trial.

6.1 Mr. Mihir Thakore, Learned Senior Counsel for the appellant submitted that in the order under appeal the learned Chamber Judge has believed the appellant's possession of four shops and advertisement hoardings as indicated in the Commissioner's report dated 28th June 2001 and therefore directed to maintain status quo in respect of the same.

6.2 Learned counsel submitted that the conclusion drawn by the learned Judge that only a very small portion of the land of the property in question is in possession of the appellant and very large portion of the property is open land and the possession thereof is not admitted is erroneous. He submitted that when the plaintiff is in possession of four shops and advertisement hoarding, a presumption should have been drawn in favour of the appellant that he is in possession of the suit land and the appellant's possession was required to be protected.

7.1 Learned counsel for the appellant submitted that the learned Chamber Judge has believed the plaintiff's possession of four shops and advertisement hoardings as indicated in the commissioner's report dated 28th June 2001 and directed maintenance of status quo in respect of the same. When the plaintiff's case in respect of possession of four shops situated in the land as well as the advertisement hoardings situated in land is believed, the conclusion drawn by the trial court that only a very small portion of the land of the property in question is in possession of the plaintiff and very large portion of the property is open land and the possession thereof is not admitted is unbelievable.

7.2 He submitted that when the plaintiff is in possession of four shops and advertisement hoarding, presumption should have been drawn in favour of the plaintiff that he is in possession of the suit land and the plaintiff's possession was required to be protected.
7.3 Learned counsel further submitted that in support of the contentions, the plaintiff had relied upon Form No.7/12 for the year 1978-79 to 1994-95 and from 1995-96 to 1999-2000 and 2000-01 to 2001-02, Form No.7/12 for the

year 1995-96 to 2001-02, copy of the notice dated 29.12.1993 under section 260(1) of BPMC Act and the maps sent by AMC to plaintiff's brother Jitubhai Kantibhai Patel for demolition of unauthorised construction made on Survey No.202, the advertisement given by defendant nos.1 to 5 dated 14.1.1996 for title clearance in respect of Sub-plot no.2 through H. Desai & Co. claiming to be the owner and in possession of the said sub-plot, reply given by the plaintiff to the above referred public notice, public notice given by defendant nos.6 and 7 on 11.8.1997 and various other documents. After referring to all those documents learned counsel for the appellant submitted that it would be evident from those documents that the plaintiff is in possession much prior to the filing of the suit.

7.4 Learned counsel also relied upon the common written statement cum reply filed by 14 defendants i.e. defendants no.1, 2, 5, 21-26, 27, 29, 30 and others to the plaint and the injunction application. He submitted that the said defendants include defendant no.29 Rashmika Bhupendrabhai who has given public notice on 24.11.2000 along with others including her sons Ashish Bhupendrabhai and Biren Bhupendrabhai, for title clearance and in response to which reply was given by the plaintiff. According to him this is material because defendant no.28-A and 28-B namely Ashish Patel and Biren Patel have subsequently appeared in the suit on 27.1.2004 through another advocate Gaurang K. Patel and filed reply to the application for injunction taking a stand in such written statement which is contrary to the stand taken by their mother in the written statement. He therefore submitted that in the above context the stand taken in the written statement for the first time is of material relevance. After referring to other written statements also it is submitted that there is clear admission apart from documentary evidence that the plaintiff is in settled possession of the suit properties and such possession is required to be protected even against the true owner as plaintiff is not a mere intermeddler or trespasser.

7.5 Learned counsel for the appellant has also relied upon three registered sale deeds in respect of parts of Sub-plot No.2 of Survey No.202 executed on 19.5.2003, 30.5.2003 and 3.6.2003; two registered sale deeds in respect of parts of Sub-plot no.2 of survey no.203 executed on 2.8.2003 and 9.9.2003.

7.6 Learned counsel for the appellant has lastly submitted that the trial court while deciding notice of motion has relied upon the word "Vigeree" to conclude that the revenue record show possession of the plaintiff

with others and not exclusively of plaintiff. He submitted that this conclusion is unwarranted in view of the evidence on record which shows that the plaintiff is in exclusive possession of the property.

8.1 Mr. D. V. Parikh learned advocate appearing for the respondents submitted that the order passed by the trial court is just and proper. According to him, the trial court has correctly found that the plaintiff being heir of Bechardas Hargovandas, was bound by the documents of 1945 and 1972. He has disputed the fact that a copy of the notice dated 29.12.1993 issued under Section 260(1) of the B.P.M.C. Act and the maps sent by the AMC to plaintiff's brother Jitubhai Kantibhai Patel for demolition of unauthorised construction made on Survey No.202 were produced before the trial Court as contended by the learned counsel for the appellant. Since the said documents are not on the record of this Court, I am not expressing my opinion on the same. Learned counsel has submitted that the trial court has correctly appreciated all the other Exhibits and submissions of the plaintiff and arrived at a conclusion that the plaintiff's possession over sub-plots no.2 and 3 cannot be believed except to the extent of certain shops and hoarding.

8.2 Learned counsel for the respondents submitted that as per the documents on record, physical possession of sub-plots has been given to the concerned parties in the year 1972 and that the plaintiff being the heir of original seller is bound by what is stated in the registered sale deeds. He pointed out that the plaintiff's possession can only be said to be of some portion of four shops and the plaintiff has failed to prove that he was in possession of the remaining land. Thus, he submitted that the order passed by the trial court is just and proper and no interference is required at the hands of this Court.

9.1 It is required to be noted that the jurisdiction of the appellate court is very limited. This has been asserted in the decision reported in 1942 Appeal Cases page 130. At page 138 of the said decision it is stated as under:

> "... The appellate tribunal is not at liberty merely to substitute its own exercise of discretion for the discretion already exercised by the judge. In other words, appellate authorities ought not to reverse the order merely because they would themselves have exercised the original discretion, had it attached to them, in

a different way. But if the appellate tribunal reaches the clear conclusion that there has been a wrongful exercise of discretion in that no weight, or no sufficient weight, has been given to relevant considerations such as those urged before us by the appellant, then the reversal of the order on appeal may be justified. This matter was elaborately discussed in the decision of this House in Evans Vs. Bartlam (2), where the proposition was stated by my noble and learned friend, Lord Wright, as follows (3): "It is clear that the Court of Appeal should not interfere with the discretion of a judge acting within his jurisdiction unless the court is clearly satisfied that he was wrong. But the court is not entitled simply to say that if the judge had jurisdiction and had all the facts before him, the Court of Appeal cannot review his order unless he is shown to have applied a wrong principle. The court must if necessary examine a new the relevant facts and circumstances in order to exercise a discretion by way of review which may reverse or vary the order. Otherwise in interlocutory matters the judge might be regarded as independent of supervision. Yet an interlocutory order of the judge may often be of decisive importance on the final issue of the case, and one which requires a careful examination by the Court of Appeal. Thus in Gardner Vs. Jay (I), Bowen L.J. in discussing the discretion of the judge as regards mode of trial says: "That discretion, like other judicial discretions, must be exercised according to common sense and according to justice, and if there is a miscarriage in the exercise of it, it will be reviewed."

9.2 The above view has been followed by the Apex Court in the case of U.P. Cooperative Federation Ltd. Vs. Sunder Bros, Delhi, reported in AIR 1967 SC 249 (=1996 Supp SCR 215). Paragraph 8 of the said decision is relevant which reads as under:

"(8) It is well established that where the discretion vested in the Court under S.34 of the Indian Arbitration Act has been exercised by the lower court the appellate court should be slow to interfere with the exercise of that discretion. In dealing with the matter raised before it at the appellate stage the appellate court would normally not be justified in interfering with the

> exercise of the discretion under appeal solely on the ground that if it had considered the matter at the trial stage it may have come to a contrary conclusion. If the discretion has been exercised by the trial court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial court's exercise of discretion. As is often said, it is ordinarily not open to the appellate court to substitute its own exercise of discretion for that of the trial judge; but if it appears to the appellate court that in exercising its discretion the trial court has acted unreasonably or capriciously or has ignored relevant facts then it would certainly be open to the appellate court to interfere with the trial court's exercise of jurisdiction."

9.3 Similar view has been reiterated by the Apex Court in case of Laxmikant V. Patel Vs. Chetanbhai Shah, AIR 2002 SC 275 (=2002(3) SCC 65 = 2001(10) JT 285 = 2001(8) Scale 350).

10.1 Heard the learned counsel for the respective parties and perused the relevant documents. It is required to be noted that there is no prayer for declaring that the plaintiff has become the owner of the property in question. Without seeking such declaration permanent injunction is sought restraining the respondents from interfering with possession of the appellant. On the contrary, it is admitted in the plaint at para 8 that the respondents are owners of sub plots nos.2 and 3. The only claim is that the appellant has become owner by way of adverse possession in respect of sub plot no.1. Therefore, it is to be presumed that the title of the respondents is admitted and there is no prayer with regard to title is sought in the suit.

10.2 As regards the transaction of the property, the trial Court has in detail discussed the same. It appears that in all such sale transactions the grand-father of the appellant was a confirming party. Therefore the trial court found that the plaintiff being heir of Bechardas Hargovandas was bound by the documents of 1945 and 1972 and as per the said documents physical possession of the sub plots was taken over by the concerned parties. I am of the opinion that the learned Judge has correctly arrived at a conclusion on the basis of the evidence on record to hold that plaintiff's possession over the sub plot nos.2 and 3 cannot be believed except to the extent of certain shops and

hoarding on the said plots.

10.3 The appellant has raised a grievance about the word "Vigere" mentioned in the village form. The trial court has dealt with this aspect in para 11 of the judgement. In this regard the trial court held that survey no.202 consisting of sub plot nos.2, 3 and 4 is having common village form 7/12. So far as revenue records are concerned, names of all owners of sub plot nos.2, 3 and 4 are shown jointly. However, it appears that for convenience sake only one name is mentioned along with "Vigere". Therefore the trial court held that "others" means that all owners of survey No.202. I am of the opinion that except this interpretation no other interpretation is possible from the said word. The trial court also found that as the type of cultivation is shown as "one" it would mean that it is self cultivation as opposed to cultivation of tenant in which type "3" is written. The trial court also rightly held that cultivation as per 7/12 must be taken to be that of "Khud" i.e. by owners themselves. Further, from the record the trial court found that physical possession of sub plots has been given to the concerned parties in 1972 and that the plaintiff being the heir of original seller is bound by what is stated in the registered sale deed.

10.4 The Court Commissioner in its report has observed that the plaintiff's possession can only be said to be of some portion of four shops and the plaintiff has failed to prove that he was in possession of the remaining land. It is also the finding that even in respect of four shops, the possession can, at best, be for 7 to 8 years prior to the suit. Therefore, I am of the opinion that the trial court cannot grant any injunction beyond the evidence on record by way of Court Commissioner's report.

10.5 Further, the Court Commissioner specifically found that grass is grown on the land and that there is no standing crop and that land is not found cultivated. From the said report, photographs and other documents, the trial court found that the averment that the plaintiff is cultivating the land is false. No documents were produced on record to show the cultivation of land at the hands of the plaintiff. When the plaintiff failed to prove possession, there was no question of granting any relief with regard to the entire land. The clear finding of the trial court is that the plaintiff has got clear case only with regard to four shops and not the entire land and that the plaintiff's case for entire suit property is not fair and bonafide. When the Court Commissioner's report indicates this fact, the trial

court was justified in refusing injunction in respect of the entire land.

10.6 It is by now a well settled position that no suit can be filed on the basis of adverse possession and injunction sought on this basis is required to be refused. It is also required to be noted that the plaintiff did not claim any tenancy right obviously because such plea would deprive of his plea of adverse or settled possession.

11.1 While deciding the case the trial court has relied upon a decision of the Karnataka High Court reported in the case of K.V. Narayan Vs. S. Sharana Gowda, AIR 1986 Kar. 77, wherein it is held that trespasser in possession is not entitled to temporary injunction against true owner. The aforesaid view has been upheld by the Supreme court in the case of Premji Ratansey Shah Vs. Union of India, reported in 1994(5) SCC 547. The same view has been followed by this Court in the case of Rukhiben Parmar Vs. Kiritkumar Patel, reported in 1997 (38) GLR 2383 and overruled the decision in the case of Ramshree Mahavir v. Girdharilal Bholanath Agarwal reported in 1970 GLR 971, wherein it is held that injunction can be granted to a trespasser. In the case of Ramubhai D. Rathod Vs. Surat Muni.Corpn., reported in 2000(3) GLR 2679 again this Court followed the aforesaid two decisions holding that no injunction can be granted in favour for trespasser against true owner.

11.2 It is also pertinent to note that in the case of Manubhai B. Patel Vs. Cheebabhai R. Patel, reported in 1995(2) GLR 1369, after referring to the decision in the case of Nair Society and others Vs. Alexander and others, reported in AIR 1968 SC 1165 and various other decisions, this Court concluded that if plaintiff can show better title than the defendants, injunction can be granted in his favour.

11.3 In the case of Tirumala Tirupati Devasthanams Vs. K.M. Krishnaiah reported in AIR 1998 SC 1132 the Supreme Court dealt with similar issue where the principle emanating from the case of Nair Society (supra) was applied and it was held that as the title of the defendant was not extinguished and is subsisting, the plaintiff who was dispossessed cannot recover possession inasmuch as defendant has better title than him.

11.4 A reference is required to be made to the decision of the Supreme Court in the case of Terene Traders Vs. R.J. & Co., reported in AIR 1987 SC 1492,

wherein the Supreme Court held that injunction should not be granted by the High Court by reversing the finding of the civil court unless the High Court concludes that the lower court was wrong in coming to the conclusion that possession is not proved. On the facts of the present case, it cannot be concluded that the trial court has erred in coming to the conclusion that the plaintiff has not proved possession over the suit premises. It is a well settled law that High Court cannot grant injunction unless it specifically holds that the plaintiff was not in possession.

11.5 Learned counsel for the respondent has relied upon a decision in the case of Roop Singh Vs. Ram Singh, reported in 2000(3) SCC 708 wherein it is held that possession as a tenant, if at all, is permissive possession and cannot become adverse possession. The two are internally inconsistent and therefore tenant cannot claim for possessory right in law.

11.6 He has relied upon a decision of the supreme Court in the case of Kanhaiyalal Vs. Anupkumar, reported in AIR 2003 SC 689, wherein it is held that possession of tenant is permissive possession and such possession even for a longer period does not make it adverse possession.

11.7 He next relied upon a decision in the case of Abdul Rahman Vs. Prasony Bai, reported in AIR 2003 SC 718 wherein it is held that the tenant cannot raise plea of adverse possession and as a tenant he cannot claim title of landlord.

11.8 Learned counsel for the respondent has also relied upon a decision in the case of Sopan Sukhdeo Sable Vs. Assistant Charity Commissioner, reported in AIR 2004 SC 1801. Paragraph 25 of the said decision reads as under:

> "25. Now the other aspect of the matter needs to be noted. Assuming a trespasser ousted can seek restoration of possession under Section 6 of the Specific Relief Act, 1963, can the trespasser seek injunction agiasnt the true owner? This question does not entirely depend upon Section 6 of the Specific Relief Act, but mainly depends upon certain general principles applicable to the law of injunctions and as to the scope of the exercise of discretion while granting injunction? In Mahadeo Savlaram Sheike V. Pune Municipal Corporation (1995(3) SCC 33), it was held, after referring to Woodrofe on "Law relating to

injunction: L.C. Goyal "Law of injunctions" : David Bean "Injunction Jayce on Injunctions and other leading Articles on the subject that the appellant who was a trespasser in possession could not seek injunction against the true owner. In that context this Curt quoted Shiv Kumar Chadha V. MCD [1993(3) SCC 161) wherein it was observed that injunction is discretionary and that:

"Judicial proceedings cannot be used to protect or to perpetuate a wrong committed by a person who approaches the Court."

Therefore, in view of the facts of the case, I am of the opinion that the trial court has rightly granted injunction only as per the evidence on record viz. the Court Commissioner's report.

12.1 Keeping in mind the jurisdiction of the appellate Court and the evidence on record, it is not possible to state that the order of the trial Court suffers from any infirmity calling for interference at the hands of this Court at this stage.

12.2 After considering all the facts and circumstances of the case, the trial court has come to the conclusion that the plaintiff has failed to show prima-facie that he is in exclusive possession of the suit property. It was found that the plaintiff has no exclusive possession over the very large portion of the property which is an open land. The prima facie case before the trial court was that the plaintiff is in possession of only four shops and advertisement hoardings as shown in the Commissioner's Report dated 20.6.2001. The trial court was, therefore, perfectly justified in allowing the Notice of Motion only partly. Under the circumstances, no case is made out to cause interference in the order passed by the trial court. In the result, the appeal is dismissed. No order as to costs.

Since the main appeal has been dismissed, the application for stay would not survive and is accordingly dismissed.

[K.S. JHAVERI, J.]

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